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IN THE

Supreme Court of the United States

October Term, 1939

No. 346

UNITED STATES OF AMERICA,

Petitioner,

v.

SOCONY-VACUUM OIL COMPANY, INC., ET. AL.,

No. 347

SOCONY-VACUUM OIL COMPANY, INC., ET. AL.,

Petitioners,

v.

UNITED STATES OF AMERICA.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit

SUPPLEMENTAL BRIEF OF RESPONDENT, R. H. McELROY, Jr.

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OPINIONS BELOW

The opinion of the district court (R. 2488) is reported in 23 F. Supp. 937. The opinion of the Circuit Court of Appeals (R. 3911) is reported in 105 F. (2d) 809.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 22, 1939 (R. 3953-4). The petition for writ of certiorari in No. 346 and the cross-petition for writ of certiorari in No. 347 were filed in this Court on August 31, 1939. Both petitions were granted on October 16, 1939. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, and as modified by Rule XI of the Criminal Appeals Rules.

QUESTION PRESENTED

The sole question dealt with in this supplemental brief is *whether or not there is sufficient evidence in the Record to warrant a judgment of conviction as to R. H. McElroy, Jr.* This question arises by reason of the denial in the trial court of R. H. McElroy, Jr.'s motion for a directed verdict at the conclusion of the case (R. 1959; 2432; 2517). The Circuit Court of Appeals decided that the trial court did not err in denying this motion. (See 105 F. (2d) 809, 839). The matter is presented for the determination of this Court by the third specification of error made in the cross-petition for a writ of certiorari filed by these respondents, which cross-petition (No. 347) was granted by this Court on October 16, 1939.

This respondent, R. H. McElroy, Jr., specifically adopts all of the points presented in the main brief herein filed as reasons for a reversal of the judgment of conviction herein rendered against him (R. 2501-2) and, in addition thereto, submits *that there is no substantial evidence*

that this respondent, R. H. McElroy, Jr., had any knowledge of and participated in any unlawful combination or conspiracy, and for that reason, this Court should reverse the judgment of conviction as to him and order a dismissal of the charges preferred against him in the indictment herein filed.

STATUTES INVOLVED

Section 1 of the Act of July 2, 1890, c. 647, 26 Stat. 209 (U. S. C., title 15, sec. 1), known as the Sherman Act, as amended by the Act of August 17, 1937, c. 690, 50 Stat. 693, provides in part as follows:

> "Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . . . Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Section 14 of the Clayton Act (15 U. S. C. A. Sec. 24) provides:

> "Whenever a corporation shall violate any of the penal provisions of the anti-trust laws, such violation shall be deemed to be also that of the individual directors, officers, or agents of such corporation who *shall have authorized, ordered, or done any of the acts constituting in whole or in part such violation,* and such violation shall be deemed a mis-

demeanor, and upon conviction therefor of any such director, officer, or agent, he shall be punished by a fine of not exceeding one year, or by both, in the discretion of the court."

STATEMENT

The general statement of facts, contained in the principal brief filed herein on behalf of all respondents, is adopted. Such general statement is sufficient to give to the Court a full background of the entire case, and it would serve no useful purpose to make any additional general statement. R. H. McElroy, Jr., a salaried employee of The Pure Oil Company, was charged with the duty of purchasing gasoline to fill the company requirements above that supplied by The Pure Oil Company's refineries. He bought this gasoline "when and as directed" by the Manufacturing Department. The details of all the testimony pertaining to McElroy's knowledge of, and participation in, the alleged unlawful conspiracy will be hereafter set forth in full. It consists of meager circumstances more consistent with innocence than with guilt. The truth of this statement will clearly appear if this Court will consider the testimony hereinafter summarized.

The Contested Issue

The contested issue dealt with in this supplemental brief is whether or not there is sufficient evidence in the Record to warrant a judgment of conviction as to R. H. McElroy, Jr.; and this supplemental brief will be confined solely to the proposition that since there is no sub-

stantial evidence that R. H. McElroy, Jr., had knowledge of and participated in any unlawful combination or conspiracy, the trial court erred in overruling his motion for directed verdict, and the Circuit Court of Appeals erred in failing to direct a dismissal of the indictment as to this respondent. We desire to make it clear that this brief is merely cumulative of the principal brief filed on behalf of all respondents, including R. H. McElroy, Jr. If it be assumed, *for the sake of this argument*, that the evidence was sufficient (*which is denied*) to establish as against two or more of the defendants an unlawful combination or conspiracy, it is our contention, in this supplemental brief, that *the evidence was wholly insufficient to show that R. H. McElroy, Jr., had any knowledge thereof and participated therein.*

The Charge Against R. H. McElroy, Jr.

The indictment charges that R. H. McElroy, Jr., among others, was "actively engaged in the management, direction, and control of the affairs and policies" of The Pure Oil Company, "particularly those affairs and policies" of said company "covered by this indictment" (R. 5); also, that he (and the other individual defendants) "have known of said unlawful purpose and have actually engaged and co-operated in the unlawful combination and conspiracy set forth in this indictment" (R. 16).

Evidence Relating to R. H. McElroy, Jr.

The evidence by which the Government sought to prove that *R. H. McElroy, Jr., knew* of the alleged conspiracy

and its "unlawful purpose" and that he *"actively engaged and co-operated"* therein, may be grouped under the following heads:

1. His position with the respondent, The Pure Oil Company.

2. His attendance at three (3) meetings, viz.: January 4, 1935; February 11, 1935; March 6, 1935.

3. Two conversations with Neil Buckley, one on March 6, 1935, and another in the summer of the same year.

4. Telegram from George Morris, General Manager of the Retail Marketing Division of The Pure Oil Company, to C. B. Watson, Vice-President of said company, in charge of marketing and refining, dated March 15, 1935.

The material evidence relating to these topics, and constituting the whole case against Mr. McElroy, will be briefly summarized. An analysis will show that the evidence against him wholly fails to substantiate the charges contained in the indictment.

1. *R. H. McElroy, Jr's position with The Pure Oil Company.*

R. H. McElroy, Jr., is not an official of The Pure Oil Company, but is a salaried employee, in charge of the Wholesale Sales Department. Mr. C. B. Watson (who was granted a new trial [R. 2491]) is Vice-President in charge of refining and marketing. He has authority over the purchasing of gasoline by The Pure Oil Company,

although R. H. McElroy, Jr., is charged with the responsibility of purchasing the company's gasoline requirements. Under him are the men in the field who do the actual buying (R. 855; 1142).

2. *Attendance at Meetings.*

R. H. McElroy, Jr., was invited to attend, and attended, meetings in Chicago on January 4th and February 11th, 1935, and a meeting in New York on March 6th, 1935. These are all the meetings attended by R. H. McElroy, Jr., which relate to the alleged conspiracy. In these meetings nothing transpired which proves that McElroy (a) had knowledge of any unlawful conspiracy and (b) participated in its execution. We shall briefly review the testimony as to what occurred at each of these meetings:

Meeting of January 4th, 1935:

This was a general stabilization meeting, called by Mr. Arnott, a high Code official (Exhibit 891; Exhibit 967; R. 3487) and held at the Blackstone Hotel in Chicago. It was attended by about forty or fifty people, among who were:

Messrs.:

Adams and Reeser	(Barnsdall)
Merritt	(Cities Service)
Karstedt and Wood	(Continental)
Majewski and Carthaus	(Deep Rock)
Miskell	(Empire)
O'Shaughnessy	(Globe)
Johnson	(Gulf)
Carpenter and Stover	(Lincoln Oil)
Ashton	(Lubrite Div.— Socony-Vacuum)

McKay	(Marathon Oil)
Smith	(National Refining)
Hughes, Gardner and Moon	(Phillips)
Snyder and McElroy	(Pure Oil)
Van Eeghen and Lakin	(Shell)
Sus	(Sinclair)
Atkins and Skelly	(Skelly Oil)
Arnott and Jones	(Socony-Vacuum)
Bullock, Ball, Jackson and Lewis	(Standard of Indiana)
Humphrey	(Standard of Nebraska)
Wright	(Texas Company)
Warner	(Tide Water)
Maguire and Peters	(Wadhams Oil)
Marcell and Mering	(White Eagle Div.—Socony-Vacuum)
Coffin	(White Star Div.—Socony-Vacuum)
McDowell	(Mid-Continent)

(R. 1167)

Of all of the above listed individuals, only five are respondents here. Those indicted, their official positions with respective companies and the disposition of this case as to them are shown in the footnote.[1]

[1]

Name	*Title*	*Company*	*Disposition of Case*
E. B. Reeser	President	Barnsdall	Granted new trial (R 2491)
Edward Karstedt	Vice-President	Continental	Not tried
B. L. Majewski	Vice-President	Deep Rock	Not tried
I. A. O'Shaughnessy	President	Globe	Granted new trial (R 2491)
H. T. Ashton	Mgr. Lubrite Div.	Socony-Vacuum	Respondent
A. M. Hughes	Sales Manager	Phillips	Granted new trial (R 2491)
H. A. Gardner	Tank Car Sales Mgr.	Phillips	Directed verdict of acquittal (R. 2477
R. H. McElroy, Jr.	Manager Wholesale Sales Dept.	Pure	Respondent

Mr. Charles E. Arnott, Chairman of the Marketing Committee under the Petroleum Code, opened the meeting with the explanation that it had been called to consider various problems of general stabilization (R. 1167-8). He reviewed the progress which had been made since the December meeting, pointing out that there were already indications that the gains were not holding, and that unless the industry took action, it would soon be back where it started. He specifically mentioned two disturbing factors in the situation:

(1) The influx of cheap gasoline into the territory which continued to undermine the retail price structure, even after it had been improved; and,

(2) The condition of the independent refiners who had deluged Washington with complaints about hot oil and cheap gasoline.

In this connection, Arnott said that he had received a telegram from a group of independent refiners in the Southwest who demanded that the stabilizers take some action to relieve their plight. He said that in his opinion, and in the opinion of many people in Washington, the in-

P. E. Lakin	Gen. Mgr. of Sales	Shell	Respondent
W. G. Skelly	President	Skelly	Directed verdict o acquittal (R. 2490
Charles E. Arnott	Vice-President	Socony-Vacuum	Respondent
Charles L. Jones	Vice-President	Socony-Vacuum	Directed verdict o acquittal (R. 2490
Edw. J. Bullock	Vice-President	Std. of Indiana	Granted new trial (R 2491)
Allan Jackson	Vice-President	Std. of Indiana	Directed verdict o acquittal (R. 2490
J. W. Warner	Asst. Vice-Pres.	Tide Water	Granted new trial (R 2491)
A. G. Maguire	Chairman of Board	Wadhams	Granted new trial (R 2491)
Robt. W. McDowell	Vice-President	Mid-Continent	Respondent

dependent refiners were going to cut the price of crude oil unless something were done to raise the price of gasoline to parity. He said that the code authorities in Washington unquestionably wanted to achieve parity, and to avoid a crude cut, and that, in his opinion, the stabilization committee should do something about it. He also pointed out that the stabilization of the tank-car market was of vital importance to the whole program, and that unless that market was stabilized, the December restorations of the retail price would all go for naught (R. 1168, 1693-6).

This led to a general discussion of the problem. B. L. Majewski, of Deep Rock, addressed the meeting on behalf of some twenty or twenty-five independent refiners whom he and O'Shaughnessy of Globe represented in stabilization activities. He emphasized their plight and repeated Arnott's statement that unless something were done they would be forced either to close down or to withdraw from code activities, abandon the code standards of wages and hours, and cut the price of crude oil. Several people, including McDowell and O'Shaughnessy, echoed the thoughts expressed by Arnott and Majewski, and agreed that something should be done (R. 1168-9; 1693-6).

Finally, Arnott called for suggestions and upon a motion being made by Majewski, he appointed the following committee to study the situation and make a report:

Name	*Disposition of Case*
R. W. McDowell (Chairman) (Mid-Continent)	Respondent
H. T. Ashton (Vice-Chairman) (Lubrite Div. Socony-Vacuum)	Respondent
L. Van Eeghen (Shell)	Not indicted

A. M. Hughes (Phillips)	Granted new trial (R. 2491)
E. Karstedt (Continental)	Not tried
I. A. O'Shaughnessy (Globe)	Granted new trial (R. 2491)
E. J. Bullock (Standard of Indiana)	Granted new trial (R. 2491)
P. M. Miskell (Empire)	Not indicted

(R. 1169-70; 1696-7).

This committee will be referred to hereafter by the name by which it subsequently came to be known throughout the industry: "The Tank-Car Stabilization Committee." Of the above members of the committee, Mr. McDowell and Mr. Ashton are the only ones who are appellants. The other members were either not indicted, or not tried, or given new trials by the trial court, as above indicated.

At the time the committee was appointed, Arnott stated that the matter which it was to study was quite important to the Petroleum Administrative Board in Washington, and that if and when the committee made any recommendations, he wanted to inform the Board of what was being done (R. 1698).

Meeting of February 11, 1935:

The Tank-Car Stabilization Committee, which had been appointed by Mr. Arnott on January 4, 1935, held its first meeting on February 5, 1935. All the members were present (R. 1178-9). At this meeting, Mr. Ashton pointed out that a survey revealed only six or seven hundred cars of distress gasoline in the hands of sixteen or seventeen mid-continent independent refiners; that, on

the other hand, some ten or twelve major companies were known to be buyers of gasoline. He thought it would be very helpful if information as to the availability of distress gasoline could be put into the hands of the major companies, and that it might be a proper function of the Committee to gather such information month by month (R. 1182). Most of those present at this February 5th meeting were favorably impressed by Ashton's suggestion, and McDowell, after being authorized to advise Arnott of the discussion and of the proposed plan, asked the committee to meet again in Chicago on February 11th, after the General Stabilization Committee meeting, which had been set for that day (R. 1184-5). Mr. McDowell advised Arnott of the plan proposed at the February 5th meeting by Ashton; also, that another meeting of the committee had been called for February 11th. Arnott thought the plan had merit, and told McDowell to explain it at the February 11th meeting to the buyers of gasoline, *but to take no action* (R. 1184-6).

Immediately after the General Stabilization Meeting in Chicago on February 11th, the Tank-Car Stabilization Committee met. The following members were present:

Name	*Disposition of Case*
R. W. McDowell (Chairman) (Mid-Continent)	Respondent
H. T. Ashton (Vice-Chairman) (Lubrite Div. Socony-Vacuum)	Respondent
A. M. Hguhes (Phillips)	Granted new trial (R. 2491)
E. Karstedt (Continental)	Not tried
I. A. O'Shaughnessy (Globe)	Granted new trial (R. 2491)
E. J. Bullock (Standard of Indiana)	Granted new trial (R. 2491)

Van Eeghen, of Shell, and Miskell, of Empire, substituted on the committee in their places two of their associates, to wit, Lakin of Shell and Tuttle of Empire (R. 1186). (Tuttle was granted a new trial, R. 2491).

Also present at the February 11th meeting were representatives of several major companies which were regular buyers of gasoline, but which were not represented on the committee. These were as follows:

Name	*Disposition of Case*
Sus (Sinclair)	Not indicted
Dipple (Sinclair)	Not indicted
Atkins (Skelly)	Not indicted
Reeser (Barnsdall)	Granted new trial R. 2491)
R. H. McElroy, Jr. (Pure)	Respondent

(R. 1186)

McDowell opened the meeting with a few remarks about the circumstances under which the committee had been appointed, and his telephone conversation with Arnott (R. 1186; 1868-9).

Ashton then explained the plan to the non-members of the committee. He said that the Connally Act would take surplus East Texas gasoline off the market and prevent it from being a disturbing influence in the Standard of Indiana territory, and that, with this gasoline out of the way, the surplus gasoline which might affect the Mid-Western area would, according to Bourque's latest survey, be limited to 600 cars a month coming from about fifteen independent refiners. He then said that it had been suggested that the major companies which were regular buyers of gasoline might be able to use this surplus (R. 1186-7).

A number of people said that they didn't want to commit themselves to buy, and that they weren't going to have anyone telling them where or how they should buy. To each objection of this kind, Ashton pointed out that no such features were involved (R. 1186-7). There were also several questions about the prices which should be paid, to which Ashton replied that this was not a price-fixing plan, that there was no basis for setting any price, and that his only suggestion was that the purchasing companies should pay the fair going market price for the gasoline which they bought (R. 1188). He also made it plain that the plan would not be put into operation until the Connally Bill had put a stop to the influx of hot gasoline into the Mid-West territory (R. 1189).

Ashton then read off Bourque's new survey, and asked those present if they would prefer to buy from any particular concerns. It developed that some of the companies were already buying from certain refiners and would like to continue to do so. Others had definite preferences, based upon old association or friendship. In this way, it was found that all but seven or eight of the independent refiners would be taken care of (R. 1187-8).

The question came up as to who would furnish the purchasing companies with the information as to the availability of distress gasoline, particularly since the original surveys might contain errors and the situations of both buyers and sellers were certain to change between surveys. Ashton proposed that a "Mechanical Sub-Committee" be appointed to handle the detailed problems that arose between monthly surveys, to receive information as to the availability of distress gasoline, and to pass it on to the

buyers. McDowell appointed himself, Ashton (of Socony) and Tuttle (of Empire) to serve on this committee (R. 1190; 1870).

At this meeting, R. H. McElroy, Jr., for Pure Oil Company, didn't make any commitment as to what he would do with reference to the plan (R. 1874). In fact, there is no evidence that R. H. McElroy, Jr., was in attendance throughout the meeting. The only evidence is that he attended—whether he came late, or left early, or stayed from the beginning to the end, is not shown.

Meeting of March 6th, 1935:

On March 1, 1935, Mr. Arnott invited Buckley and a group of major company representatives to a meeting to be held in the Waldorf-Astoria Hotel, New York, on March 6th. His telegram to The Pure Oil Company was received by Mr. C. B. Watson, Vice-President, in charge of marketing and refining, and is as follows:

> "AM CALLING MEETING WALDORF HOTEL WEDNESDAY MARCH SIXTH OF SMALL GROUP MAJOR COMPANIES TO HEAR OUTCOME MY MEETING WITH EAST TEXAS REFINERS AND TO CONSIDER FUTURE ACTION SURPLUS GASOLINE THIS AND OTHER GROUPS THAT IS AWAITING OUR DECISION TELEGRAPH ME MY OFFICE 26 BROADWAY IF YOU OR YOUR REPRESENTATIVE WILL ATTEND MATTER OF EXTREME IMPORTANCE AND ANXIOUS YOU BE WITH ME.
>
> C. E. ARNOTT"

(Exhibits 482 and 717)

R. H. McElroy, Jr., attended the meeting, the reasonable inference being that he attended it at the request of, and

as the representative of, Mr. Watson. The following persons were in attendance at the meeting:

Name	*Disposition of Case*
Eckert (Sun Oil Company)	Not indicted
Hartmann (Gulf)	Indicted but not tried
Gould (Shell Oil & Refining Co.)	Not indicted
Stone (Atlantic)	Not indicted
Ewing (Socony-Vacuum)	Not indicted
Collins (Tide Water)	Not indicted
Frueauff (Cities Service)	Granted new trial (R. 2491)
Carnes (Sinclair)	Granted new trial (R. 2491)
Burns (Richfield)	Not indicted
Blaustein (American Oil Co.)	Not indicted
Hatmaker (Pan American Oil)	Not indicted
McElroy (Pure Oil Company)	Respondent
Neil Buckley (Cities Service Export)	Not indicted
O. D. Robinson (Republic)	Not indicted

(R. 1713)

It is thus seen that the *only individual respondents* who were present at the foregoing meeting are Mr. Arnott and R. H. McElroy, Jr. Others were either not indicted, not tried, or granted new trials, as above indicated.

The foregoing companies were all particularly active on the East Coast, and were substantial buyers of gasoline. Companies whose interests lay primarily in the Middle West were not invited, because East Texas gasoline never appeared in the Middle West except under unusual or abnormal conditions (R. 1714).

Mr. Arnott opened the meeting by pointing out how uncooperative the East Texas refiners had been in stabilization and said that he believed it was his duty to have Buckley, representing the East Texas refiners, and Robinson, representing a group of Gulf Coast Refiners, to talk to those present and to see what could be done to improve the situation. He stated that both men were trying to find buyers of gasoline from their respective groups (R. 1717). Buckley explained the purpose of East Texas refiners to turn over a new leaf and stop running hot oil, saying more or less the same thing that he had said to Arnott at Pinehurst and Chicago, which was in substance, that he had carefully analyzed the situation and felt that such refiners were sincere; that they had everything to gain by being cooperative with the industry and the petroleum administrative board in adopting good practices with respect to the allocations, and the things they had been so freely disregarding; that they wanted Buckley to find a way of contacting the large buyers so that they could find a market for their distress product, and that he had been trying to make contacts with major companies (R. 1717; 579; 574). Robinson also addressed the meeting, telling those present about the distress of the Gulf Coast refiners (R. 1717).

Buckley testified that the principal interest of those present at the meeting

> "... was what the association was going to do about hot oil. Everyone was scared to death of handling East Texas gasoline, and of going back to East Texas to buy; and they wanted to know from me whether I thought these refiners were sincere. ..."

He was asked whether the East Texas refiners were going to support the passage of the Connally Act, and cooperate with it, to which he answered, "Yes" (R. 580-1).

Buckley and Robinson then withdrew from the meeting and a discussion was had as to what Buckley had said. There were expressions of doubt as to whether a change had really come to the East Texas refiners. Some of those present felt that the matter ought to be looked into further to see what could be done to assist such refiners; others said definitely that they had no confidence in Buckley's presentation and would have nothing to do with it. The opinions ran all the way from complete negative to a feeling that the matter ought to be dealt with constructively (R. 1718).

Buckley had been unable to give dependable information concerning the amount of surplus gasoline in East Texas, and the question arose as to whether the Federal allocators would give the refiners allocations which would permit them to run legitimately the same quantity they had been running in hot oil, or whether the allocations would be something less. When Buckley and Robinson could not answer the question with reference to allocations, a five-man committee was appointed to accompany Arnott, Buckley and Robinson to Washington the next week to see the allocators (R. 1718-19). McElroy was not a member of this committee.

3. *Conversation with Neil Buckley*

While in New York, at this time, Buckley saw and talked to R. H. McElroy, Jr., whom he had known for a number of years, and told him that he was off on another

tour to try and get help for the East Texas refiners, and asked McElroy whether The Pure Oil Company was going to buy in the East Texas Market. We quote the conversation thereafter, as follows:

> "He told me they badly needed gasoline, but they were afraid to buy it in East Texas, and would not buy it in East Texas, unless they could be assured that the Tender Board was going to function properly, but if it did not function properly, they were going to have to buy on the Gulf Coast, or some place else, and *it would depend on his Manufacturing Department what they bought and where they bought it.*" (R. 593)

Subsequently, Buckley talked with R. H. McElroy, Jr., by telephone some time during the summer of 1935, pleading for a let-down in the rigid specifications on the gasoline purchased by Pure in East Texas (R. 593).

4. *Telegram from George Morris (Pure) to C. B. Watson (Pure) dated March 15, 1935.*

On March 15, 1935, George Morris, General Manager of the Retail Marketing Division of The Pure Oil Company, sent a telegram from New York to C. B. Watson, who was in Chicago, reading as follows:

> "ARNOTT HOLDING MEETING TWO O'CLOCK THIS AFTERNOON IN CONNECTION WITH PURCHASE OF SURPLUS GASOLINE AND HAS ASKED US TO ATTEND. MAC DID NOT OUTLINE DISCUSSION THAT TOOK PLACE AT LAST MEETING BUT ASSUME YOU ARE FAMILIAR WITH IT AND WOULD LIKE TO KNOW IF YOU HAVE ANY INSTRUCTIONS TO PASS ON IN CONNECTION WITH MEETING OR ANY

COMMITMENTS YOU HAVE AUTHORIZED FOR PURCHASE OF SURPLUS GASOLINE STOP ARNOTT SEEMS EXTREMELY OPTIMISTIC WITH RESULTS TO DATE.

MORRIS"

(Exhibits 482; 717)

The "Mac" referred to in the foregoing telegram is the respondent, R. H. McElroy, Jr. (R. 620-1).

SPECIFICATION OF ERROR TO BE URGED

(1) The Circuit Court of Appeals erred in sustaining the action of the District Court in denying the motion of R. H. McElroy, Jr., for a directed verdict of not guilty. (Third specification of error in cross-petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.)

(2) The Circuit Court of Appeals erred in reversing and remanding this case in so far as respondent R. H. McElroy, Jr., is concerned as, because of insufficient evidence, the trial court should have granted respondent's motion for a directed verdict, and the Circuit Court of Appeals should have ordered a dismissal of the case as to R. H. McElroy, Jr.

SUMMARY OF THE ARGUMENT

I.

The general rules of law which should have governed the trial court in passing upon the motion for directed verdict filed by R. H. McElroy, Jr., are:

(a) The court must not weigh conflicting evidence, but must look solely to the question of *whether there is any evidence to support a conviction.*

(b) The evidence which would support a conviction must be *competent.*

(c) The evidence which would support a conviction must be *substantial. Abrams* v. *United States,* 250 U. S. 616, 619.

II.

Corporate agents will not be held liable for a violation of the Sherman Act unless the proof shows that such agent authorized, ordered or did some of the acts constituting in whole or in part such violation. In other words, before an officer, director or agent of a corporation can be held individually responsible for a violation by the corporation of the Sherman Act, it must be proved by competent and substantial evidence that (a) he knew of the alleged conspiracy; and (b) he participated therein; and the Circuit Court of Appeals erred in not so holding. *United States* v. *Standard Sanitary Mfg. Co.,* 191 Fed. 172; *Patterson* v. *United States,* 222 Fed. 599.

III.

There is no evidence in this Record that R. H. McElroy, Jr., had knowledge of any illegal combination and participated therein; and, therefore, this respondent's motion for a directed verdict should have been granted by the District Judge; and the Circuit Court of Appeals erred in not so holding. *France* v. *United States,* 164 U. S. 676, 683.

ARGUMENT

I.

The Applicable Law

The Supreme Court, in the case of *Abrams* v. *United States*, 250 U. S. 616, held that when a defendant in a criminal case makes a motion for a directed verdict,

> "A question of law is thus presented, which calls for an examination of the record, not for the purpose of weighing conflicting testimony, but only to determine whether there was some evidence, competent and substantial, before the jury, fairly tending to sustain the verdict."

See also *France* v. *United States*, 164 U. S. 676; *Pierce* v. *United States*, 252 U. S. 239; *Reuben* v. *United States*, 86 F. (2d) 464 (C. C. A. 7th). Thus, there are three general principles to be observed:

(a) The Court must not weigh the evidence but must look solely to the question of whether there is *any evidence* to support a conviction.

(b) The evidence which would support a conviction must be *competent;* and

(c) The evidence which would support a conviction must be *substantial.*

By the great weight of authority, "substantial evidence" is evidence of facts which exclude every other hypothesis but that of guilt.

Isbell v. *United States*, 227 Fed. 788 (C. C. A. 8th); *Grant* v. *United States*, 49 F. (2d) 118 (C. C. A. 3rd);

Graceffo v. *United States*, 46 F. (2d) 852 (C. C. A.); *Nicola* v. *United States*, 72 F. (2d) 780 (C. C. A. 3rd); *Paul* v. *United States*, 79 F. (2d) 561 (C. C. A. 3rd); *Read* v. *United States*, 42 F. (2d) 636 (C. C. A. 8th); *Danaher* v. *United States*, 39 F. (2d) 325 (C. C. A. 8th); *Salinger* v. *United States*, 23, F. (2d) 48 (C. C. A. 8th); *Tinsley* v. *United States*, 43 F. (2d) 890 (C. C. A. 8th); *Rosenthal* v. *United States*, 45 F. (2d) 1000 (C. C. A. 8th); *Gargotta* v. *United States*, 77 F. (2d) 977 (C. C. A. 8th); *Moore* v. *United States*, 56 F. (2d) 794 (C. C. A. 10th); *Parnell* v. *United States*, 64 F. (2d) 324 (C. C. A. 10th); *Gerard* v. *United States*, 61 F. (2d) 872 (C. C. A. 7th).

In the case of *Isbell* v. *United States*, 227 Fed. 788, the Court said:

> ". . . It is certain the evidence of facts as consistent with innocence as with guilt is not sufficient to sustain a conviction, and that at the close of every trial by jury it is the duty of the court upon request to consider and determine whether or not there is any substantial evidence of the guilt of the accused, and, if there is none, to instruct the jury to return a verdict for the defendant. If there is, at the conclusion of a trial, no substantial evidence of facts which exclude every other hypothesis but that of guilt, there is no substantial evidence of the guilt of the accused, for facts consistent with his innocence are never evidence of his guilt. . . ."

In the case of *Gerard* v. *United States*, 61 F. (2d) 872, the rule is stated:

> "Where all the evidence is as consistent with innocence as with guilt, . . . it is our duty to override a verdict of guilt; . . ."

The Government relies wholly upon circumstantial evidence to sustain the conviction against R. H. McElroy, Jr. The rule that "evidence as consistent with innocence as with guilt, is never evidence of guilt" applies to a case based on circumstantial evidence. It is well settled that where a circumstance is susceptible of two inferences—one of which is in favor of innocence—such circumstance is robbed of all probative value.

In the case of *Turinetti* v. *United States*, 2 F. (2d) 15 (C. C. A. 8th) the Court said:

> "Whenever a circumstance, relied on as evidence of criminal guilt, is susceptible of two inferences, one of which is in favor of innocence, such circumstance is robbed of all probative value, even though from the other inference, guilt may be clearly deductible."

In the case of *DeLuca* v. *United States*, 298 Fed. 412, the Court held:

> "Where circumstantial evidence is relied on, circumstances proved must not only point to the defendant's guilt, but must be inconsistent with his innocence." (Syl.)

Section 14 of the Clayton Act (15 U. S. C. A. Sec. 24) provides:

> "Whenever a corporation shall violate any of the penal provisions of the anti-trust laws, such violation shall be deemed to be also that of the individual directors, officers, or agents of such corporation who *shall have authorized, ordered or done any of the acts constituting in whole or in part such violation*, and such violation shall be deemed a misdemeanor, and upon conviction therefor of any such

director, officer, or agent, he shall be punished by a fine of not exceeding $5,000, or by imprisonment for not exceeding one year, or by both, in the discretion of the Court."

This section of the Clayton Act is merely a restatement of the law as it existed prior to its enactment. *United States* v. *Standard Sanitary Manufacturing Company,* 191 Fed. 172; *United States* v. *Winslow,* 195 Fed. 578; *National Cash Register Company* v. *Leland,* 94 Fed. 502; *Patterson* v. *United States,* 22 Fed. 599.

The case of *Patterson* v. *United States,* 222 Fed. 599, decided prior to the enactment of the Clayton Act, very clearly states what must be proven to hold an officer, agent, or director liable where the corporation violates the Sherman Act. In discussing the question, the Court said:

> "In order for the defendants to have so conspired it is essential that they had such connection with the National Company that in the performance of their duties they had to do with its competitors. Those of its officers and agents who had nothing to do with competition, as, for instance, those in the manufacturing department, can not be said to have so conspired. *It is not sufficient to connect any officer or agent of the National Company with the conspiracy that they knew of it or acquiesced in it. They must by word or deed have become a party to it.* (*People* v. *Richards,* 1 Mich. 216, 51 Am. Dec. 85, 5 R. C. L. p. 1065.)"

In the case of *Tingle* v. *United States,* 38 F. (2d) 573, the defendant was found guilty of a conspiracy to manufacture, sell and deliver liquor, in violation of the National Prohibition Act. On appeal, the conviction was reversed

on the ground that the prosecution had failed to establish such a conspiracy. The other parties to the alleged conspiracy were one Hoard, and one Amalia, employees of Tingle, and found on the premises. Tingle had leased a warehouse as an oil jobber, in which warehouse the vats, beer, etc., were found. Hoard and Amalia were present at the warehouse and admitted the officers and summoned Tingle. Under these facts, the Court held:

> "... *Knowledge without some evidence of participation is not enough. Circumstances merely arousing suspicion of guilt are insufficient.* ... The evidence was unconflicting and was that of the Government alone. In such a case, when the circumstances relied upon are as consistent with innocence as with guilt, they are robbed of all probative value. ..."

Thus, before an officer, director, or agent of a corporation can be held individually responsible for a violation by the corporation of the Sherman Act, it must be proven by competent and substantial evidence that,

(a) he knew of that alleged conspiracy, and

(b) participated therein.

Participation cannot be inferred merely because one is employed by a conspirator and knew of the conspiracy. *Tingle* v. *United States*, 38 F. (2d) 573.

Where a motion for directed verdict was *improperly* denied by the trial court, the Supreme Court of the United States will reverse the judgment and order a dismissal of the case. *France* v. *United States*, 164 U. S. 676, 683.

II

An Analysis of The Pure Oil Company's Operations.

Before discussing the evidence relating to R. H. McElroy, Jr., we desire first to give the Court some idea of The Pure Oil Company's operations, its gasoline requirements and the extent of R. H. McElroy, Jr.'s duties in connection therewith.

The Pure Oil Company does business in thirty-two states (R. 860) and during the years 1931, through 1936, and for the first six months of 1937, its gasoline sales were as follows:

1931	493,000,000	Gals.
1932	502,000,000	Gals.
1933	489,000,000	Gals.
1934	520,000,000	Gals.
1935	587,000,000	Gals.
1936	662,000,000	Gals.
1937 (1st 6 mo.)	332,000,000	Gals.

(Ex. 739)

It is seen that the sales during each year increased considerably over the preceding year; that 1935 sales increased by 67,000,000 gallons over 1934 sales; and that 1936 sales increased by 75,000,000 gallons over 1935 sales.

To supply this gasoline sales demand, The Pure Oil Company has seven refineries, situated in Texas, Oklahoma, Ohio, Michigan, West Virginia, and Pennsylvania, but such refineries have been unable to manufacture sufficient gasoline to supply Pure's sales demand, and for years it has been a large purchaser of gasoline. During 1935 and 1936 these refineries were operated at their maximum ca-

pacity, (R. 1145), yet during these years The Pure Oil Company had to purchase more gasoline than it had ever before purchased, in order to supply its sales demand. Prior to the year 1935 (the year the indictment charges that the alleged conspiracy began) The Pure Oil Company had purchased from more than one-third of the East Texas and Mid-Continent independent refiners, charged in the indictment as co-conspirators (R. 860). In 1931, the company purchased from independent refiners in the East Texas and Mid-Continent areas 320,000 gallons of gasoline, and from other sources 8,000,000 gallons. In 1932, the company purchased 450,000 gallons of gasoline from East Texas and Mid-Continent independent refiners and from other sources 11,000,000 gallons. In 1933, the company purchased from East Texas and Mid-Continent independent refiners 647,000 gallons of gasoline, and from other sources, 31,000,000.

In 1934, the company purchased from East Texas and Mid-Continent independent refiners, 3,619,000 gallons of gasoline, and from other sources, in excess of 18,000,000 gallons.

In January, 1935, the company, faced with an acute shortage of gasoline, entered into processing contracts with other refiners, on a month to month basis, in order to further supplement its manufacture (R. 1146). During the year 1935, the company purchased from Mid-Continent and East Texas independent refiners 10,339,000 gallons of gasoline; from other sources, 18,906,000 gallons, and had processed for it 60,000,000 gallons.

In 1936, the company purchased from East Texas and Mid-Continent independent refiners 16,919,000 gallons of gasoline; from other sources, in excess of 23,000,000 gallons, and had processed for it 79,000,000 gallons.

In the first six months of 1937, the company purchased from East Texas and Mid-Continent independent refiners 6,828,000 gallons of gasoline; from other sources, 12,000,000 gallons, and had processed for it in excess of 45,000,000 gallons (Ex. 739; R. 856-7; 1146).

To summarize—during the period of 1931 through the first six months of 1937, The Pure Oil Company obtained from sources, other than its own manufacture, the following gasoline:

1931	8,320,000	Gals.
1932	11,450,000	Gals.
1933	31,647,000	Gals.
1934	21,619,000	Gals.
1935	89,245,000	Gals.
1936	118,000,000	Gals.
1937 (1st 6 mo.)	63,828,000	Gals.

(Ex. 739).

R. H. McElroy, Jr., charged with the responsibility of obtaining the company's gasoline requirements over and above its own manufacture, was responsible after receiving directions from the Manufacturing Department, for the foregoing acquisitions of gasoline.

There were only six or seven hundred cars of distress gasoline per month in the hands of Mid-Continent independent refiners, and approximately the same amount per month in the hands of East Texas independent refiners, (R. 1189; 664; 626)—or roughly, 125,000,000 gallons of distress gasoline during the year 1935, and approximately the same amount during 1936. The necessary gasoline requirements of The Pure Oil Company, over and above its own manufacture, were such that it could have pur-

chased and sold, had it so desired, practically all of the distress gasoline in the hands of the independent refiners in the East Texas and Mid-Continent areas, during the period covered by the indictment.

As a matter of fact, Pure Oil Company's purchases of gasoline from East Texas and Mid-Continent independent refiners were relatively small compared with its gasoline requirements over and above its own manufacture. The Pure Oil Company had to purchase gasoline to carry on its marketing business. The capacity of its refineries was wholly insufficient to supply its gasoline sales demand. Therefore, *it is clear that no inference of guilt can be drawn from the fact that the Company purchased gasoline from independent refiners, particularly in view of the fact that such had been a Company policy for many years prior to the date of the alleged conspiracy.* Such acts are certainly as consistent with innocence as with guilt.

III

There is no evidence that R. H. McElroy, Jr., individually participated in any illegal buying program either by ordering, authorizing, or doing any of the acts complained of.

R. H. McElroy, Jr., does not personally determine the amount of gasoline to be purchased nor does he determine the source of purchase. His department merely receives instructions from the Manufacturing Department as to "what to buy and where to buy it." His department, in turn, conveys this information to the proper field representatives (men like Dewey K. Chamberlain, whose

motion for directed verdict was granted), who acquire the amount specified from sources which can meet the Manufacturing Department's requirements, both as to specifications and as to point of delivery. Bearing in mind the tremendous amount of gasoline which The Pure Oil Company obtained from sources other than its own manufacture during the period covered by the indictment, and that R. H. McElroy, Jr., as head of the Wholesale Sales Department, was charged with the responsibility of obtaining such gasoline, in the manner and way above described, how can the Government single out a few purchases and contend that R. H. McElroy, Jr., is guilty because such purchases were made under his general supervision? *There is not a "scintilla" of competent evidence that R. H. McElroy, Jr., ever directed that any gasoline purchased be made from any particular refiner.*

Jacobi testified that Pure Oil Company's "dancing partners" in the Mid-Continent area were Eason Refining Company and Omar Refining Company. (R. 439-40). The Pure Oil Company made its first purchase from Eason Refining Company on June 7, 1935, and made its first purchase from Omar Refining Company on May 24, 1935 (Ex. 741)—both purchases, made many months after R. H. McElroy, Jr., attended his one and only meeting of the Tank-Car Stabilization Committee on February 11, 1935. The total amount of gasoline purchased by The Pure Oil Company during the year of 1935 from these two oil companies was 1,268,000 gallons (Ex. 741). This was approximately 1½% of the Pure's total purchases during the year of 1935.

Bearing in mind that the Mid-Continent buying program began to function on March 7, 1935 (R. 1199-1200)

and that during the period March 7th to June 7th millions of gallons of gasoline were being obtained by The Pure Oil Company, through its Wholesale Sales Department (Ex. 739), is it not reasonable to assume that if R. H. McElroy, Jr., at the February 11th meeting had agreed to any purchases of surplus gasoline from Eason and Omar Refining Companies, he would have ordered purchases made long prior to May 24th and June 7th, 1935? *No one stated that he made any such agreement, and there are no facts from which such an agreement on his part can be reasonably inferred.*

We repeat: *There is no evidence that R. H. McElroy, Jr., ordered or authorized the purchase of or that he personally purchased a single gallon of gasoline from those independent refiners in the East Texas and Mid-Continent areas, alleged to be conspirators,* and we submit that there can be drawn no logical inference, from R. H. McElroy, Jr.'s position with The Pure Oil Company, that he individually participated in any illegal buying programs, *either by ordering, authorizing, or doing any of the acts complained of.* Participation in an illegal combination or conspiracy must be proved by testimony *aliunde* acts and declarations of other alleged conspirators in the course of the illegal program. *Dowdy* v. *United States,* 46 F. (2d) 417. No such proof can be found in this record as against respondent, R. H. McElroy, Jr.

No criminal acts can be imputed to R. H. McElroy, Jr., by reason of his being in attendence at the meeting January 4, 1935. The meeting was called by Mr. Arnott, the chief stabilizer under the Petroleum Code, and any innnocent man would attend a meeting called by such a high Code official. There is no inference of guilt by reason of attendance at such a meeting.

It is significant to note that some forty or fifty people attended the January 4th meeting, and only four of such persons, exclusive of R. H. McElroy, Jr., are respondents. We submit that R. H. McElroy, Jr.'s attendance at such a meeting is a circumstance from which no reasonable inference of guilt can be drawn.

Nor can any reasonable inference of guilt be imputed to R. H. McElroy, Jr., by reason of his attending the February 11th meeting of the Tank-Car Stabilization Committee, at which meeting the proposed plan of purchasing distress gasoline in the mid-continent area was explained.

The meeting was called by Mr. McDowell, the Chairman of such committee, and R. H. McElroy, Jr., was invited to attend. It was a Code meeting, and any innocent man, interested in the administration of the petroleum industry under the N. I. R. A. would have attended. There is no evidence that, at this meeting, R. H. McElroy, Jr., participated in the discussion, or agreed that The Pure Oil Company would participate in the purchase of distress gasoline. *On the other hand, the positive evidence by Mr. Sus is that R. H. McElroy, Jr., made no statement as to what The Pure Oil Company would or would not do concerning the plan.* No plan was formulated at the meeting, and Mr. McDowell, the Chairman, had specific instructions from Mr. Arnott to "discuss the plan with these people, but take no action."

Clearly, this meeting was solely for further discussing the plan with members of the Committee, and also with those invited to attend. That no agreement was reached at such meeting is clearly borne out by the subsequent occurrences, as testified to by Mr. Jacobi, Mr. McDowell,

and Mr. Arnott. In fact, the Government claims that at the next meeting of the Tank-Car Stabilization Committee, on March 5th, the plan to purchase distress gasoline was formalized.

With reference to this February 11th meeting, the only evidence concerning R. H. McElroy, Jr., is that he attended and made no commitment. Whether he came late, or left early, or stayed from the beginning to the end is not shown. Whether he heard all of the details of the proposed plan is not shown. There were thereafter held the following meetings of the Tank-Car Stabilization Committee:

March 5, 1935	at St. Louis, Mo.
April 5, 1935	at Excelsior Springs, Mo.
May 6, 1935	at Chicago, Ill.
Early June, 1935	at Tulsa, Okla.
Early August, 1935	at Tulsa, Okla.
Early September, 1935	at Tulsa, Okla.
Early October, 1935	at Chicago, Ill.
November 5, 1935	at St. Louis, Mo.
December 4, 1935	at Chicago, Ill.
December 27, 1935	at Tulsa, Okla.
January 28, 1936	at Tulsa, Okla.
February 27, 1936	at Chicago, Ill.

(R. 400).

At none of these meetings was R. H. McElroy, Jr., or any other representative of The Pure Oil Company present (R. 399).

Is it reasonable that if R. H. McElroy, Jr., "was actively engaged in the management, direction, and control of the affairs and policies" of The Pure Oil Company, "particularly those affairs and policies" of said company

"covered by the indictment" that he or some other representative of the company would fail to be present at some of the foregoing meetings, particularly, when four of the meetings were held in Chicago, where the home offices of The Pure Oil Company are situated, and where R. H. McElroy, Jr., resides?

Is R. H. McElroy, Jr., to be held responsible for what the committee may have done in his absence at one or more of the twelve subsequent meetings, none of which he attended?

The first purchases by Pure from its alleged "dancing partners" on June 7th and May 24th, 1935, are too remote from R. H. McElroy, Jr.'s attendance at the February 11th meeting to give rise to any inference of guilt as to him. This very fact points more to his innocence than to his guilt.

If R. H. McElroy, Jr., were an actor in the alleged conspiracy relating to the Mid-Continent buying program, we fail to find any evidence of such fact. Surely he would have attended more than one meeting of the Tank-Car Stabilization Committee, if he had any part in such program.

Concerning the alleged East Texas buying program, R. H. McElroy, Jr., attended only one meeting with reference thereto—March 6th, 1935. At this meeting, no plan of action was agreed upon, and no company made any commitment as to whether they would buy from East Texas independent refiners. The whole matter was left "dangling in the air," while a committee went to Washington to discuss the East Texas situation with the Board of Allocators, set up under the Petroleum Code. There-

after, the following meetings were held with reference to the East Texas program:

March 15, 1935	New York (R. 1720)
May 29, 1935	New York (R. 1726)

Neither of these meetings was attended by R. H. McElroy, Jr., nor by anyone representing him, although such meetings were attended by other representatives of The Pure Oil Company (R. 1713; 1747). If he had anything to do with his company's purchasing surplus gasoline from independent East Texas refiners, under a concerted program, such as that alleged in the indictment, is it not reasonable to believe that he would have been present, either in person, or by representative, at such meetings? *No one has testified that R. H. McElroy, Jr., did any act in furtherance of any kind of a concerted buying program, whether legal or illegal.*

His attendance of the March 6th meeting does not give rise to an inference of guilt, particularly when such meeting was called by Mr. Arnott, the "chief stabilizer" appointed by Mr. Ickes, Administrator of the Petroleum Code. Any innocent man would attend such a meeting. A clear picture of the extent of R. H. McElroy, Jr.'s participation in the March 6th meeting is given in his subsequent conversation with Neil Buckley, on the same day, concerning which Mr. Buckley testified:

> "He told me they badly needed gasoline but they were afraid to buy it in East Texas, and would not buy it in East Texas unless they could be assured that the Tender Board was going to function properly, that they were going to have to buy on the Gulf Coast or some place else, and *it would depend on the*

Manufacturing Department what they bought, and where they bought it."

The foregoing evidence reflects that Mr. R. H. McElroy, Jr., had nothing to do with what gasoline was bought by The Pure Oil Company, and where it was bought. These decisions were committed to the Manufacturing Department. R. H. McElroy, Jr.'s duty was to obtain such gasoline as they told him to purchase. There is no evidence that R. H. McElroy, Jr., at the March 6th meeting participated in the discussion or agreed that The Pure Oil Company would participate in the purchase of distress gasoline from independent East Texas refiners. No such agreement was made by anyone. It is significant to note that of the fifteen or more people in attendance at the March 6th meeting, only R. H. McElroy, Jr., and Mr. Arnott are respondents.

The one piece of evidence which more clearly than any other indicates that R. H. McElroy, Jr.'s conduct was more consistent with innocence than with guilt is the telegram from George Morris, General Manager of the Retail Marketing Division of The Pure Oil Company, to C. B. Watson, Vice President in charge of marketing and refining, dated March 15th, 1935, sent from New York the same day the March 15th meeting was held in New York. It is as follows:

"ARNOTT HOLDING MEETING TWO O'CLOCK THIS AFTERNOON IN CONNECTION WITH PURCHASE OF SURPLUS GASOLINE AND HAS ASKED US TO ATTEND. MAC DID NOT OUTLINE DISCUSSION THAT TOOK PLACE AT LAST MEETING BUT ASSUME YOU ARE FAMILIAR WITH IT AND WOULD LIKE TO KNOW IF YOU HAVE ANY IN-

STRUCTIONS TO PASS ON IN CONNECTION WITH MEETING OR ANY COMMITMENTS YOU HAVE AUTHORIZED FOR PURCHASE OF SURPLUS GASOLINE STOP ARNOTT SEEMS EXTREMELY OPTIMISTIC WITH RESULTS TO DATE."

Does the foregoing telegram indicate that R. H. McElroy, Jr., had any power to authorize the company's participation in any buying program? Mr. Morris, General Manager of the Retail Marketing Division, surely didn't think so. He felt that Mr. Watson, Vice President, was the person to give "instructions . . . in connection with meeting" and ". . . commitments . . . for purchase of surplus gasoline." The only reasonable inference from this telegram is that R. H. McElroy, Jr., had nothing to do with "the affairs and policies" of The Pure Oil Company, "particularly those affairs and policies covered by this indictment."

From the foregoing evidence, the Government seeks to prove that R. H. McElroy, Jr.,——

(a) knew of the alleged conspiracy, and

(b) that he participated therein.

Knowledge is sought to be proved by reason of his attendance at the February 11th and March 6th meetings. But since there is no direct proof of knowledge, such must be inferred by reason of his attendance at such meetings.

We do not contend that knowledge as to what occurred at the meetings cannot be reasonably inferred from the fact that he attended the meetings. However, knowledge alone is not sufficient. The *Government must go further and prove participation* in an unlawful combination or conspiracy. The only evidence of Mr. McElroy's participa-

tion, to which the Government can point in this record, is his position with The Pure Oil Company. As Manager of the Wholesale Sales Department, he was charged with the responsibility of obtaining his company's gasoline requirements over and above its own manufacture, in such manner as the Manufacturing Department directed. We know of no rule of law holding an agent of a corporation liable solely because of his position with such corporation. If official position alone were sufficient to sustain a judgment of conviction, we do not believe that the Trial Court would have rendered the decision dismissing twelve company executives, which this Court reviewed in the case of *United States* v. *Patrick T. Stone,* decided during the present term of this Court.

The Government, to prove knowledge of the alleged conspiracy on the part of R. H. McElroy, Jr., must do so by inferring knowledge from his presence at the two meetings above mentioned. Then, *after having inferred knowledge,* the Government must go further, and infer participation by reason of the inference of knowledge, and R. H. McElroy, Jr.'s position with the company.

They infer participation from an inference of knowledge —an inference upon an inference. This is condemned by the authorities of every jurisdiction. As stated by the Supreme Court of the United States, in the case of *United States* v. *Ross,* 92 U. S. 281:

> "They are inferences from inferences; presumptions resting on the basis of another presumption. Such a mode of arriving at a conclusion of fact is generally, if not universally, inadmissable. No inference of fact or of law is reliable drawn from premises which are uncertain."

Again in the case of *RiBaste* v. *United States,* (C. C. A. 8th) 44 F. (2d) 21, the Court announced the rule:

> "Presumption must be based upon proved fact, and not upon another presumption."

Therefore, the Government cannot say that there is a presumption of knowledge on the part of R. H. McElroy, Jr., from his attendance at the February 11th and March 6th meetings, and then say that there is a presumption that he participated in the alleged conspiracy by reason of the presumption of knowledge and his position with the company, because such constitutes the basing of a presumption upon a presumption.

Can it be said that the Government has made a case against R. H. McElroy, Jr.?

There is no evidence that he had anything to do with authorizing or ordering purchases of gasoline by The Pure Oil Company in the alleged buying program, or that he had anything to do with company policy in that respect; there is no evidence that at the February 11th and March 6th meetings he participated in the discussion or agreed that The Pure Oil Company would participate in the purchase of distress gasoline. In fact, there is no evidence that he was in attendance throughout these meetings and heard all of the discussion that took place. There is no evidence that he ordered purchased, authorized the purchase of, or personally purchased any gasoline from the independent refiners in the East Texas and Mid-Continent areas, alleged to be co-conspirators. In such a state of the record, the proper judgment to be entered here is one remanding the case and directing a dismissal thereof.

If the Government could base their case upon R. H. McElroy, Jr.'s attendance at the two meetings, and his position with the company, by piling an inference of participation upon an inference of knowledge, then indeed the presumption of innocence in a criminal case means nothing, and any person would be subject to punishment by reason of some suspicion or conjecture being cast upon him. The same reasons which impelled the Trial Court to dismiss twelve high company officials (reviewed by this Court in *United States* v. *Patrick T. Stone*) should impel this Court to dismiss this case as to R. H. McElroy, Jr., a salaried employee of The Pure Oil Company.

We feel that the Government's case against R. H. McElroy, Jr., is properly characterized by Judge Hutcheson, in the case of *Symonette* v. *United States*, 47 F. (2d) 686 (C. C. A. 5th):

> "This is one of those cases, of which the books contain too many instances, of an effort by the Government, on a conspiracy indictment, to supply the place of testimony by piling inference upon inference; of an effort to make deduction take the place of proof; and to have the jury, by reasoning backward from non-criminal acts, build up by inference a state of facts to make them criminal, which, if they in fact exist, the evidence ought to have established."

It may have been impossible for the Trial Court and jury to have given proper consideration to R. H. McElroy, Jr.'s case, due to the great number of defendants involved and the mass of testimony adduced at the trial. However, this much is clear: ***R. H. McElroy, Jr., should not be a respondent here.*** All others occupying similar positions were either not indicted or, where indicted, they have been

granted dismissals or secured new trials. R. H. McElroy, Jr., was neither a Code official nor a member of any committee which considered the matters complained of by the Government. He participated in no unlawful combination or conspiracy. It would be manifestly unjust for the conviction against R. H. McElroy, Jr., to stand, particularly, where the Government, to make out a case against him, must pile an inference of participation upon an inference of knowledge, supported only by the fact that R. H. McElroy, Jr., was a salaried employee of a company, responsible as such for the purchase of gasoline requirements over and above company refinery output.

CONCLUSION

We appeal to the Court's sense of fairness and justice in asking that as to the respondent, R. H. McElroy, Jr., the verdict of the jury, which is unsupported by any testimony, be set aside. The Government has wholly failed to establish the essential elements of its case against him, and, in such a situation, the law imposes upon this Court the responsibility and duty to see that he is relieved from a jury verdict of guilty, which is unwarranted by the law, and unsupported by the evidence. It is clear that the trial judge should have granted McElroy's motion for directed verdict, and this Court should reverse this case, as to R. H. McElroy, Jr., and order a dismissal thereof. We urge that, in the consideration of the important general issues of this case, the Court not overlook, or brush aside as unimportant, a careful determination of the issue raised in this supplemental brief, because this is vitally important to this respondent who occupies a relatively obscure posi-

tion, as compared with many of the industry leaders who have been dismissed from this case, and who is entitled to have this Court clear his name of an unfounded and unjustified charge of having deliberately broken the laws of his country.

Respectfully submitted,

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